In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1594

MARIE PHILLIPS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is not yet officially reported. The Board's decision and order (Pet. App. B) are reported at 178 NLRB No. 53.

JURISDICTION

The judgment of the court of appeals was entered on January 19, 1971. The petition for a writ of certiorari was filed on April 19, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

425-321—71

QUESTION PRESENTED

Whether, on the facts of this case, the Board properly found that the union possessed authorization cards from a majority of the employees that were not obtained fraudulently or by misrepresentation.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth at Pet. 2–3.

STATEMENT

On September 6, 1966, the Union [1] initiated a campaign to organize the employees of petitioner (the "Company"). In the next few months, it obtained 68 signed cards from the 110 employees in the appropriate bargaining unit, designating the Union as the bargaining representative (A. 634–635, 659; 3–5, G.C. Exh. Nos. 3a–15, 17, 19, 20–27, 29–32, 34, 36–42, 44, 45–68, 70).[2] While the Union campaign was underway, Company officials interrogated employees respecting their Union sympathies and activities; threatened employees, *inter alia,* with plant closing if the Union became the employees' bargaining representative; promised employees various benefits and granted several employees pay raises in an attempt to weaken their support for the Union; discharged one Union advocate, Concetta Cambria; and refused

[1] Local 153, International Ladies' Garment Workers' Union, AFL–CIO.

[2] "A." refers to the appendix to the briefs in the court below.

to reinstate seven employees who struck over the Company's unfair labor practices (Pet. App. B, pp. A30–A40, A42).[3]

On January 19, 1967, the Union requested the Company to recognize it as the bargaining representative of the Company's employees (A. 624–625; 429–434, 572 (47)–(49)). The Union offered to prove its majority through a card check conducted by an impartial observer agreed to by the parties (A. 624–625; 520–521, 572 (36)–(37), 572 (43)–(46), 572 (73)–(74)). On January 24, Frank Rametta, the Company's president, responded that he did not believe the Union represented a majority of the employees and that therefore he was declining to recognize the Union (A. 625; 572 (47)–(49)). On January 25, the Union again demanded recognition and was again rebuffed (A. 625; 572 (65)–(66)).

The Board found that the Company violated Section 8(a)(5) of the Act by refusing to recognize and bargain with the Union (see Pet. App. B, p. A42). It rejected the Company's contention that the Union lacked valid authorization cards from a majority of the employees because some 26 employees had signed cards only after Union representatives falsely asserted "that a majority had already been obtained" (Pet App. B, p. A8). In doing so, the Board stated that "[w]here the objective facts, as evidenced by events contemporaneous with the signing, clearly demon-

[3] The Company does not challenge here the Board findings that by these acts petitioner violated Section 8(a) (1) and (3) of the Act.

strate that the misrepresentation was the decisive factor in causing an employee to sign a card, we shall not count such card in determining a union's majority. However * * * where the only indication of reliance is a signer's subsequent testimony as to his subjective state of mind when signing the card, such showing is insufficient to invalidate the card" (Pet. App. B, p. A9).

Following a review of the record, the Board found that "[o]f the 26 disputed signers only about half a dozen—a number clearly insufficient to destroy the Union's majority in the 110 employee appropriate unit * * *—testified as to objective facts" (Pet. App. B, p. A11, n. 6). Moreover, it noted, the Examiner had found that testimony controverted and declined to credit it (*ibid.*). The remaining employees had given "*subjective* testimony only," which, the Board held, was not of sufficient probative value to impeach their earlier act of signing a clear and unequivocal authorization card (Pet. App. B, pp. A11–A12). Since the Company had not shown that the cards that it challenged were improperly obtained, the Board upheld the Union's asserted majority status.

The Board ordered the Company to cease and desist from the unfair labor practices found, to reinstate with backpay the employees discriminated against, to bargain with the Union as the exclusive representative of the employees, and to post appropriate notices (Pet. App. B. pp. A14–A17). The court of appeals sustained the Board's findings and conclusions and enforced its order (Pet. App. A.)

ARGUMENT

Contrary to petitioner's assertion (Pet. 6–7), the decision below does not conflict with decisions in other circuits. Applying well established and accepted principles, the Board concluded that in this case there was an "absence of strong and convincing evidence of objective facts showing that the card majority in this case would not have been obtained but for the misrepresentation that a majority had already signed up" (Pet. App. B, pp. A12–A13). The court below utilized a like test in enforcing the Board's order, explaining that "puffing [that a majority of the workers had already signed union authorization cards] does not vitiate the cards unless the comments were a means of coercing employees to sign cards out of a fear of majority reprisal" (Pet. App. A, p. A4). Necessarily, a determination such as this turns on the particular facts presented. Thus properly viewed, the decision below is consistent with the decisions in other circuits relied on by petitioner (Pet. 6–8).

The only question here is whether the Board properly declined to rely on petitioner's proof—which consisted of employee testimony, given long after the cards were signed, as to the subjective reaction of the employee at the time of signing to the Union's alleged misrepresentation that a majority had already signed.[4] This issue does not warrant further review. In *National Labor Relations Board* v. *Gissel*

[4] As shown above, of the 26 disputed signers only about half a dozen, a number insufficient to destroy the Union's majority, "testified as to certain objective facts which might tend to show that their cards would not have been signed in the first instance but for the misrepresentation that a majority had al-

Packing Co., 395 U.S. 575, 608, the Court "reject[ed] any rule that requires a probe of an employee's subjective motivations as involving an endless and unreliable inquiry". This is essential, the Court held, "because employees are more likely than not, many months after a card drive and in response to questions by company counsel, to give testimony damaging to the union, particularly where company officials have previously threatened reprisals for union activities in violation of Section 8(a)(1)" (*ibid.*).[5] This

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ready signed" (App. B, p. A11, n. 6). In effect, the balance of the testimony consisted of uncorroborated employee declarations that they would not have signed if they had not been told that a majority or more of the employees had signed. See, e.g., the testimony of Cancellieri, A. 572 (116)–(117); Interlandi, A. 572 (137)–(138); Casais, A. 572 (134)–(135); Canassi, A. 572 (117)–(125); Cereio, A. 573 (143)–(144); Henderson, A. 364, 365, 366; Gentle, A. 566, 568; Thomas, A. 117, 118; Hall, A. 110, 111; Hill, A. 107; Formica, A. 497; Hardwick, A. 493, 494, 495; Hayes, A. 529; Rizza, A. 33, 541, 544; Tosi, A. 90; DeRenzo, A. 100–101; Campbell, A. 109; Contino, A. 492.

[5] Indeed, this case confirms the Court's concern. Employee Sammartino at the original Board hearing testified that she signed a card because she was nervous, and that the Union solicitor showed her a bunch of cards which she estimated as less than a majority, but did not tell her how many others had signed. It was not until the reopened hearing, some 5 months later, that Sammartino stated she would not have signed but for the representation that almost all the employees had already signed (Pet. App B, pp. A11–A12). The Board noted additional instances (Pet. App. B, p. A12, n. 7): "Several employees testified at the original hearing that they did not care whether the solicitor's statement as to majority status was true, and others testified that they did not believe such representation of the solicitors. Yet, upon the reopening of the hearing, a number of the aforementioned employees testified that they would not have signed had they known that the solicitor's statement was false."

rationale is equally applicable here, where the Company launched a "classic" (Pet. App. A, p. A3) unfair labor practice campaign consisting, *inter alia*, of threats of plant closing, interrogations, promises and grants of benefits, and discharges, to counteract the Union's organizing drive. Petitioner's attempt to distinguish *Gissel* (Pet. 10) is therefore without substance.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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